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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	WT Docket No. 97-199
	)	
WESTEL SAMOA, INC.	)	File No. 00560-CW-L-96
	)	
For Broadband Block C Personal	)	
Communications Systems Facilities	)	
	)	
and	)	
	)	
WESTEL, L.P.	)	File Nos. 00129-CW-L-97
	)	00862-CW-L-97
For Broadband Block F Personal	)	00863-CW-L-97
Communications Systems Facilities	)	00864-CW-L-97
	)	00865-CW-L-97
	)	00866-CW-L-97

TO: Honorable Arthur I. Steinberg  
Administrative Law Judge

**MOTION FOR SUMMARY DECISION**

Westel Samoa, Inc. ("WSI"), Westel, L.P. ("WLP"), and Quentin L. Breen (WSI, WLP and Mr. Breen collectively the "Westel Parties"), by their counsel and pursuant to Section 1.251 of the Rules of the Federal Communications Commission ("Commission" or "FCC"), 47 C.F.R. § 251, hereby move for summary decision on all of the issues still set for hearing in the instant proceeding. In support of their motion, the Westel Parties state as follows:

**Procedural Matters**

Section 1.251(a)(1) of the Rules provides that "any party to an adjudicatory proceeding may move for summary decision." WSI and WLP were named as parties by the Hearing Designation Order

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which initiated this proceeding.<sup>1</sup> Mr. Breen was accorded party status in this proceeding by the Presiding Judge.<sup>2</sup> All of the Westel Parties, therefore, are parties entitled to seek summary decision as to the issues in this proceeding.

Section 1.251(a)(1) requires that a motion seeking summary decision be filed "at least 20 days prior to the date set for commencement of the hearing." The hearing in this proceeding is set to commence on February 10, 1997, a date twenty days hence.<sup>3</sup> Therefore, this motion is filed timely.

It also is relevant that all discovery in this proceeding was to be completed almost a month ago, on December 24, 1997.<sup>4</sup>

Accordingly, the instant motion is timely and proper.

#### Remaining Issues

The issues specified in the HDO and remaining for adjudication in this proceeding are:

2. (A) To determine the facts and circumstances surrounding the conduct of Quentin L. Breen in connection with PCS 2000's bids placed on January 23, 1996, in the Commission's Broadband PCS C Block auction;
- (B) To determine, based on the evidence adduced above, whether Quentin L. Breen engaged in misrepresentations before and/or exhibited a lack of candor towards the Commission.

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<sup>1</sup> Memorandum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause, FCC 97-322 (released September 9, 1997) ("HDO").

<sup>2</sup> Order, FCC 97M-173 (released October 20, 1997).

<sup>3</sup> Id.

<sup>4</sup> Id.

3. To determine, based on the evidence adduced in Issue 2, whether Westel Samoa, Inc., and Westel, L.P., possess the requisite character qualifications to be granted the captioned C Block and F Block Broadband Personal Communications Services applications, and accordingly, whether grant of their applications would serve the public interest, convenience, and necessity.

The HDO also directs a determination as to whether a forfeiture should be issued against Mr. Breen for "having willfully violated the Communications Act of 1934 or the Commission's Rules."

#### Procedural Anomaly

The HDO clearly anticipated that the burden of proceeding with regard to any alleged misrepresentations of Anthony T. "Terry" Easton would be upon the Wireless Telecommunications Bureau ("Bureau").<sup>5</sup> The HDO also makes clear that the Commission's concerns regarding Mr. Breen, and hence WSI and WLP, arise out of, and revolve around alleged misrepresentations by Mr. Easton.<sup>6</sup> In fact, the Commission specifically recognized that, "for all practical purposes, we cannot examine Mr. Breen's role in this controversy without examining Mr. Easton's."<sup>7</sup> However, both Mr. Easton's participation in this proceeding, and the issue specified by the HDO with regard to Mr. Easton, were terminated by the Presiding Judge because Mr. Easton "waived or forfeited his hearing rights."<sup>8</sup> As a result, the Westel Parties now find themselves in the awkward position of having the burden

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<sup>5</sup> HDO, at Para. 58.

<sup>6</sup> HDO, passim.

<sup>7</sup> HDO, at Para. 45.

<sup>8</sup> Order, FCC 97M-172 (released October 20, 1997).

of demonstrating that Mr. Breen did not make misrepresentations or lack candor with regard to alleged actions of Mr. Easton which are no longer subject to being examined in this proceeding.<sup>9</sup>

Faced with this anomalous situation, and in order to provide a frame of reference for the evaluation of Mr. Breen's conduct, the Westel Parties hereby acknowledge, arguendo, and for the limited purpose of this motion, that: (i) on January 23, 1996, during Round 11 ("Round 11") of the Commission's Broadband PCS C Block Auction ("Auction"), PCS 2000 inadvertently submitted an \$180,060,000 bid ("bidding error") for the Norfolk-Virginia Beach-Newport News-Hampton, VA BTA ("Norfolk BTA" or "Market"); (ii) PCS 2000 intended its Round 11 bid for the Norfolk BTA to be in the minimum allowable amount, \$18,006,000; (iii) Mr. Easton had a telephone conversation regarding the bidding error with Louis Segalos of the Commission's auction staff;<sup>10</sup> (iv) Mr. Easton transmitted bidding spreadsheets to Mr. Segalos by facsimile;<sup>11</sup> and (v) some of the information conveyed to the Commission in that conversation or that facsimile transmission

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9 Certainly, the Westel Parties' burden of proceeding and burden of proof with regard to Issues 2 and 3 does not include the burden of proving a case for or against Mr. Easton.

<sup>10</sup> Exh. 20, p. 3. In an effort to facilitate review and consideration of this pleading, the Westel Parties have compiled what they view as relevant documents and deposition transcripts into a single volume, which is submitted herewith. Having done so, they do not claim to have exhausted legitimate evidentiary resources, but they do hope they have assembled sufficient of those resources to present a fair overview as to the context of the bidding error and the activities related thereto.

<sup>11</sup> Exh. 10.

now may be considered to be inaccurate.

#### Background

As set forth in the HDO, PCS 2000, L.P. ("PCS 2000") was an applicant bidder in the Auction.<sup>12</sup> PCS 2000's corporate general partner, Unicom, Inc. ("Unicom"), contracted with Romulus Telecommunications, Inc. ("Romulus") to conduct Auction bidding activities on behalf of PCS 2000. Romulus, in turn, contracted with The San Mateo Group ("SMG")<sup>13</sup> for logistical support for those bidding activities.<sup>14</sup> At the time of the bidding error, PCS 2000's designated bidding agents were Mr. Easton, Mr. Breen and Javier Lamoso. Messrs. Easton and Breen generally conducted bidding activities out of SMG's offices in San Mateo, California. Mr. Lamoso, who was resident in Puerto Rico, participated in the bidding activities through telephone and facsimile communications.<sup>15</sup>

Any valid examination of Mr. Breen's involvement in the PCS 2000 bidding error and its aftermath must acknowledge that Mr.

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<sup>12</sup> PCS 2000 now is known as ClearCom, L.P. For purposes of this pleading, however, that applicant/bidding entity will be referred to as PCS 2000.

<sup>13</sup> The HDO erroneously characterizes SMG as a "subsidiary" of Romulus. Both Mr. Breen and Mr. Easton had direct or indirect ownership interests in Romulus. SMG, by contrast, was owned only by Mr. Easton and his wife. Exh. 1, pp. 12-13; Exh. 3, p. 14; Exh. 5-A, p. 5. Accordingly, SMG was not a subsidiary of Romulus, and Mr. Breen did not have any interest in, or any control of, SMG.

<sup>14</sup> The various agreements and contracts with regard to Auction services contained limitation of liability and indemnification provisions.

<sup>15</sup> Exh. 1, p. 14.

Breen was not present in the offices of SMG during the business day on January 23, 1996, the date on which the bidding error occurred, and the time during which Mr. Easton had telephone and facsimile communications with the FCC.<sup>16</sup> As reflected by his testimony and his mobile telephone records, Mr. Breen, during that time, was traveling from his home in Oregon to San Mateo.<sup>17</sup> Mr. Breen, therefore, neither participated in nor witnessed that day any of (1) the submission to the Commission of PCS 2000's Round 11 bids; (2) PCS 2000's discovery of the bidding error; (3) any telephonic communication between PCS 2000 and the FCC; (4) any transmittal of materials to the FCC; (5) any communication with PCS 2000's Washington communications counsel; or (6) the creation, review, selection, removal, discarding, or transmittal of any documentation regarding the bidding error. Mr. Breen's knowledge of the activities and events which took place in the SMG offices on January 23, 1996 has at all times been limited to that information available to him from documents, or that related to him by other persons. Accordingly, it is necessary to review, in chronological sequence, how information regarding the bidding error may have made its way to Mr. Breen. And, the Westel Parties submit, when examining the oral transfer of information, it is most appropriate to focus on the perception of the person to whom the information is directed, because it is perception and

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<sup>16</sup> Exh. 1, pp. 15-16; Exh. 5-A, p. 21; Exh. 5-B, p. 8; Exh. 24, at page 1 of attached Declaration of Quentin L. Breen.

<sup>17</sup> Exh. 1, pp. 16-24; Exh. 9-A.

understanding which constitute knowledge, regardless of the intent of the person attempting to impart the information.

### Facts

On the part of SMG and PCS 2000, the bidding error was discovered by Ronit Milstein, an SMG employee, who was checking the Round 11 bidding result reports from the Commission as they were being printed out in SMG's offices.<sup>18</sup> Ms. Milstein showed the report to Cynthia Hamilton, another SMG employee. Ms. Milstein and Ms. Hamilton then brought the bidding error to Mr. Easton's attention.

After being apprised of the bidding error, Mr. Easton spoke by telephone with Mr. Segalos.<sup>19</sup> Ms. Hamilton remembers overhearing Mr. Easton tell Mr. Segalos that the "error was on the FCC side."<sup>20</sup> Following his telephone conversation with Mr. Segalos, Mr. Easton sent a copy of PCS 2000's internally generated bidding spreadsheets, which reflected an \$18 million bid for the Norfolk market, to Mr. Segalos by facsimile.<sup>21</sup>

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<sup>18</sup> The erroneous bid charged to PCS 2000 by the Commission was \$180,060,000 for the Norfolk BTA, rather than the \$18,006,000 which PCS 2000 had intended for that market.

<sup>19</sup> Exh. 4-A, p. 22.

<sup>20</sup> Exh. 4-A, p. 23. Although the telephone conversation between Mr. Easton and Mr. Segalos was recorded by the FCC, and the parties knew it was being recorded, no one associated with either SMG or PCS 2000 had access to that recording at any time relevant to the issues herein.

<sup>21</sup> Exh. 10. The cover sheet on this document served as the cover sheet for identical facsimile transmissions to both "Louis Segalos" and "Mike Sullivan".

Thereafter, Mr. Easton had no further direct contact with the Commission regarding the bidding error. Mr. Easton had not consulted with PCS 2000's communications counsel prior to his conversation and correspondence with Mr. Segalos.<sup>22</sup>

After faxing the spreadsheets, Mr. Easton contacted Michael Deuel Sullivan of Wilkinson, Barker, Knauer & Quinn, PCS 2000's Washington communications counsel.<sup>23</sup> Mr. Easton informed Mr. Sullivan of the bidding error and his communications with Mr. Segalos. Mr. Easton also explained the documents he had faxed to Mr. Segalos and Mr. Sullivan. Mr. Easton indicated that the document bearing his initials had been changed, after PCS 2000's Round 11 bids had been submitted to the FCC, so as to conform to changes that had been made "on line" during the bidding process. When Mr. Sullivan inquired about the availability of the "original file that had been uploaded to the bidding computer," he was informed it had been "automatically overwritten when [Mr. Easton] made the conforming changes." By the conclusion of his telephone conversation with Mr. Easton, Mr. Sullivan believed that the spreadsheets transmitted by Mr. Easton were the best available, albeit less than ideal, evidence as to what PCS 2000 had transmitted to the FCC.<sup>24</sup> Mr. Sullivan also understood that Mr. Easton (i) "didn't believe there had been any error at his end"; (ii) "thought it was unlikely it was a transmission error";

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22 Exh. 2, pp. 10-11.

23 Id.

24 Exh. 2, pp. 13-17.



and (iii) "thought it was more likely that [the error] was at the FCC's end."<sup>25</sup>

After conferring with Mr. Easton, Mr. Sullivan spoke by telephone with Sue McNeil at the Auctions Division, whom he informed of the bidding error. He indicated to Ms. McNeil that PCS 2000 "wanted to find out if the FCC had recorded the keystrokes that had been transmitted to verify whether or not there had been an error on the FCC's end or not."<sup>26</sup> Mr. Sullivan also indicated he would fax Ms. McNeil copies of the spreadsheets he had received from Mr. Easton, "including some materials that had been updated after the auction to conform to changes made on line."<sup>27</sup> After his telephone conversation with Ms. McNeil, Mr. Sullivan sent her those materials. The cover of Mr. Sullivan's facsimile transmission to Ms. McNeil specifically indicated he was transmitting "PCS 2000's printouts of (1) the bids the company believes were uploaded to the FCC in Round 11...."<sup>28</sup>

By late evening -- approximately 7:00 pm (EST) -- on the day of the bidding error, Mr. Sullivan had been told by the Commission's auction staff that (i) the bidding error had not occurred at the Commission's end; (ii) PCS 2000 would be able to

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25 Exh. 2, pp. 17-18.

26 Exhibit 2, pp. 18-19.

27 Exh. 2, pp. 19 and 21.

<sup>28</sup> Exh. 11. N.B., the cover sheet also gives notice that "[t]hese were previously sent to Louis Segalos."

withdraw its bid for the Norfolk market during the next day's bid withdrawal period; and (iii) it would be necessary for PCS 2000 to file a waiver request in order to obtain relief from any penalties associated with the bidding error.<sup>29</sup> Mr. Sullivan transmitted that information to Mr. Easton shortly after discussing it with the FCC staff. Mr. Sullivan, anticipating the need for declarations to support any waiver request, also instructed Mr. Easton to begin preparing a written explanation of the day's events.<sup>30</sup>

Mr. Breen and Mr. Sullivan did not speak on January 23, 1996, the day the bidding error occurred.<sup>31</sup>

Some other people in the SMG offices on January 23, 1997 became concerned regarding Mr. Easton's reaction to the disclosure of the bidding error. Ms. Hamilton, who had operated the computer from which PCS 2000's bids were submitted, and who had been with Ms. Milstein when Ms. Milstein had discovered the bidding error, was particularly concerned.

Among other things, Ms. Hamilton was concerned that Mr. Easton would attempt to blame her for the bidding error. This concern arose immediately after the discovery of the bidding error. Ms. Hamilton testified that, upon Mr. Easton learning of the bidding error, "The first thing he said was "'How could you let this get by you?' or 'How could you let this happen?'

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<sup>29</sup> Exh. 2, p. 19.

<sup>30</sup> Exh. 2, p. 34.

<sup>31</sup> Exh. 2, p. 28.

something like that."<sup>32</sup> As noted above, Ms. Hamilton also remembers overhearing Mr. Easton tell Mr. Segalos that the "error was on the FCC side."<sup>33</sup> Ms. Hamilton, however, recalls having seen internal bidding records indicating that bidding error originated within PCS 2000. In addition, Ms. Hamilton believed that Mr. Easton had altered the computer records at SMG before creating the materials he faxed to Mr. Segalos and Mr. Sullivan.

Ms. Hamilton's concern about being blamed for the bidding error was exacerbated by her subsequent discovery that the binder containing PCS 2000's Round 11 bidding records was missing from her work station.<sup>34</sup> At that point, remembering that an earlier iteration of PCS 2000's bidding spreadsheets, which had been initialed and dated by Mr. Easton, had been discarded into the trash can at her desk, Ms. Hamilton retrieved those documents and hid them. When Mr. Easton came looking for the discarded documents, Ms. Hamilton deflected his search by asking him "something like 'Did you bring them back to your office' just to try and get him away from [her] work area."<sup>35</sup> As a result, Mr.

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<sup>32</sup> Exh. 4-A, p. 22; Exh. 4-B, p. 18.

<sup>33</sup> Exh. 4-A, p. 23.

<sup>34</sup> Exh. 4-A, pp. 28-29. See also, Exh. 4-A, p. 39, where Ms. Hamilton states:

"I know I discussed with [Ms. Milstein] at some point that Terry had taken my binder and that binder existed in my mind mostly for my protection because I was being asked to do something I was not authorized to do and I wanted his signature on papers giving me that authorization and that he had taken that away....

<sup>35</sup> Exh. 4-A, p. 31.

Easton did not find the discarded documents.

Later, when she left the SMG offices at lunch time, Ms. Hamilton took the discarded documents to her home. While there, Ms. Hamilton telephoned an attorney at the Commission's offices in Washington, D. C., and told him that she believed Mr. Easton was providing inaccurate information to the Commission with regard to the bidding error. After the lunch hour, Ms. Hamilton returned to the SMG offices, but did not tell anyone there about the discarded documents she had retrieved and removed from the SMG offices.<sup>36</sup>

Sometime on January 23, 1996, Ms. Hamilton and Ms. Milstein discussed the Round 11 bid submission procedures. Ms. Milstein remembers them reviewing Ms. Hamilton's actions as the operator of the bid submission computer. Ms. Hamilton described to Ms. Milstein the various reviews and cross-checks she had performed before submitting PCS 2000's bids to the Commission.<sup>37</sup> As a result of that review, Ms. Milstein was able to assure Ms. Hamilton that she was not to blame for the bidding error.<sup>38</sup> Ms. Hamilton believes that, at some point on January 23, 1996, Ms. Milstein indicated to her that the bidding error was not Ms. Hamilton's fault.<sup>39</sup>

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36 Exh. 4-A, p. 34.

37 Exh. 5-A, pp. 38-39 and 42-44; Exh. 5-B, pp. 23, 29, and 47-48.

38 Exh. 5-A, p. 40; Exh. 5-B, p. 49.

39 Exh. 4-A, p. 34.

From her discussions with Ms. Hamilton, Ms. Milstein got the impression that Ms. Hamilton was very concerned that Mr. Easton would try to pin the blame for the bidding error on Ms. Hamilton.<sup>40</sup> In her discussions with Ms. Milstein, Ms. Hamilton also indicated her concern as to the implications of the bidding records binder being missing.<sup>41</sup> Another concern Ms. Hamilton expressed to Ms. Milstein that day was that Mr. Easton, in his telephone conversation with Mr. Segalos, had been untruthful by attempting to blame the FCC for the bidding error.<sup>42</sup>

Ms. Milstein also had concerns of her own about Mr. Easton's January 23, 1996 statements regarding the cause of the bidding error. Her specific concern arose from her responsibility for preparing the recorded message on the PCS 2000 call-in line. Mr. Easton had suggested to her a message that "there was an error that we thought was in the FCC computer."<sup>43</sup> When she telephonically expressed to Mr. Breen a concern about blaming the FCC computer, Mr. Breen instructed her to seek Mr. Sullivan's advice as to appropriate language for the recorded message.<sup>44</sup> As a result of her consulting with Mr. Sullivan on the subject, Ms. Milstein used the word "discrepancy" to describe the bidding

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40 Exh. 5-A, pp. 43-44.

41 See, note 34, supra.

42 Exh. 5-A, pp. 27, 38 and 44.

43 Exh. 6-A, pp. 30-32.

44 Id.

error.<sup>45</sup> The use of that word by Ms. Milstein was not meant to assign blame for the bidding error; it was intended by her to describe the uncertainty and confusion of the situation at that time.<sup>46</sup>

Both Ms. Milstein and Ms. Hamilton left the SMG offices for the day before Mr. Breen's 6:30 pm (PST) arrival.

Although Mr. Breen was not present in the SMG offices during business hours on January 23, 1996, he did have cellular telephone conversations with SMG personnel.<sup>47</sup> During one of those calls, Mr. Easton informed Mr. Breen of the bidding error. As noted above, Mr. Breen also discussed with Ms. Milstein the preparation of a recorded message. Mr. Breen also recalls that, during the course of a call that day, Mr. Easton indicated that he thought the bidding error had been caused by the FCC. In any event, most of the cellular telephone calls that day were relatively brief because of the driving conditions Mr. Breen encountered during his trip from Oregon to San Mateo.

After Mr. Breen arrived at the SMG offices on the evening of January 23, 1996, he discussed the bidding error with Mr. Easton. They also prepared PCS 2000's bids for the next day's Round 12.

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45 Exh. 5-A, p. 33.

46 Id.

47 Exh. 9-A; Exh. 1, pp. 16-29 and 65-66; Exh. 24, Declaration of Quentin L. Breen at ¶ 3. Mr. Breen has clarified that his initial notice of the bidding error came during a cellular telephone call he made in response to a message Mr. Easton had left with Mr. Breen's home office, not in a call Mr. Easton made to Mr. Breen's cellular telephone. See, Exh. 1, pp. 21.

Mr. Breen estimates he was at the SMG offices for no more than two hours that evening.<sup>48</sup>

Mr. Breen saw the bidding records binder in the SMG offices on January 24, 1996.<sup>49</sup> When Mr. Breen placed the Round 12 records in the binder after completing the bid submission for that round, the Round 11 material was in the binder.<sup>50</sup> The Round 11 material then in the binder showed an \$18 million bid for the Norfolk market,<sup>51</sup> a dollar amount inconsistent with the \$180 million bid amount recorded by the FCC. To Mr. Breen, that inconsistency "was part of the mystery" then surrounding the bidding error.<sup>52</sup> In any event, Mr. Breen had no reason to doubt that the bidding spreadsheet in the binder for Round 11 was anything other than a legitimately created record of PCS 2000's Round 11 bidding activity.

On the morning (PST) of January 24, 1996, Mr. Breen participated in telephone conferences with several PCS 2000 principals and counsel, including Fred H. Martinez, the Chairman of Unicom, and Messrs. Easton, Lamoso and Sullivan. During those conversations, Mr. Easton and Mr. Sullivan discussed their respective contacts with the FCC regarding the bidding error, including their each having asked the Commission to check whether

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48 Exh. 1, p. 30.

49 Exh. 1, pp. 48-49.

50 Id.; Exh. 12; Exh. 13.

51 Id.

52 Exh. 1, pp. 67-68.

the bidding error had occurred "at the FCC's end." The parties to those conversations were advised by communications counsel that, from the FCC's perspective, the specific cause of the bidding error was not important; the decisional factor for the FCC would be that the bidding error had been an inadvertent mistake. Mr. Easton also acknowledged that, after PCS 2000's Round 11 bids had been transmitted the FCC, he changed the computer bidding records at SMG so as to conform them to bid changes which had been made "on-line". By the end of those conversations, it had been decided, inter alia, that (1) PCS 2000 would withdraw the erroneous bid during that day's Round 12 bid withdrawal period; (2) PCS 2000 would prepare and submit to the FCC a request for waiver of any bidding penalty attributable to the bidding error; (3) Mr. Sullivan, as counsel, and Mr. Easton, as the person having the best factual knowledge of the situation, would prepare the waiver request; and (4) PCS 2000 would acknowledge to the FCC that the bidding error resulted from PCS 2000's own bidding process.<sup>53</sup> It also was decided that principal responsibility for PCS 2000's bidding activity would be Mr. Breen's, at least while Mr. Easton worked with Mr. Sullivan on the preparation of a waiver request. Although Mr. Breen was not assigned direct responsibility for the preparation of the waiver request, he was to be kept informed as to its progress and content. In addition, Mr. Martinez telephonically directed Mr.

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<sup>53</sup> By January 24, 1996, the day after the bidding error, no one associated with PCS 2000 was alleging that the bidding error was the fault of the Commission. Exh. 2, pp. 39-41.



Easton to prepare a "thorough and all-inclusive report" on the bidding error, a directive which also was set forth in writing.<sup>54</sup> Following the telephone conversations, Mr. Easton sent statements to both Mr. Sullivan<sup>55</sup> and Mr. Martinez.<sup>56</sup>

During the Round 12 bid withdrawal period on January 24, 1996, PCS 2000 withdrew its \$180 bid for the Norfolk BTA.<sup>57</sup>

Ms. Hamilton did not go to work at the offices of SMG on January 24, 1996, the day after the bidding error. Instead, she sent a resignation to SMG by facsimile. In her resignation, Ms. Hamilton indicated she would send someone to pick up her final pay check and personal property from the offices of SMG.<sup>58</sup>

On January 24, 1996, after faxing her resignation to SMG, Ms. Hamilton had a telephone conversation with Ms. Milstein. In that conversation, Ms. Hamilton indicated she could not continue to work at SMG because she felt Mr. Easton had lied about the bidding error.<sup>59</sup>

During the morning (PST) of January 24, 1996, Ms. Hamilton was called by the Commission attorney to whom she had talked during her lunch hour the previous day. At some point in that telephone call, the then General Counsel of the Commission came

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54 Exh. 14.

55 Exh. 15.

56 Exh. 16.

57 Exh. 13.

58 Exh. 17-C.

59 Exh. 5-B, pp. 32-33.

on the line. Ms. Hamilton again explained her observations and beliefs regarding the bidding error. Pursuant to that telephone conversation, Ms. Hamilton transmitted to the FCC, by facsimile, copies of the bidding records she had retrieved from her trash can and removed from the offices of SMG, and a copy of her resignation from SMG. She also prepared and transmitted a declaration.<sup>60</sup>

Sometime after completing PCS 2000's Round 12 bid submission and bid withdrawal activities on January 24, 1997, Mr. Breen had a conversation with Ronit Milstein.<sup>61</sup> In the course of that conversation, Ms. Milstein informed Mr. Breen that Ms. Hamilton had resigned from SMG by facsimile. Ms. Milstein also informed Mr. Breen of certain concerns related to her by Ms. Hamilton. Principal among Ms. Hamilton's concerns, as related to Mr. Breen by Ms. Milstein, was that Mr. Easton would attempt to blame the bidding error on Ms. Hamilton, while she thought that the fault for the bidding error lay with Mr. Easton. Ms. Milstein informed Mr. Breen that Ms. Hamilton also was concerned because she believed Mr. Easton had lied about the bidding error being the FCC's fault. Ms. Milstein indicated to Mr. Breen that Ms.

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60 See, Exh. 17 and Exhs. 17-A, 17-B and 17-C. As to the documents she had removed from the offices of SMG, Ms. Hamilton "made quite a few copies. Some of them just were spread around the house. I had sent three copies out of the -- the bidding documents, not my declaration, on the night of January 23rd -- I sent copies to -- two friends and my brother just in case anything happened to the originals." (Deposition of Cynthia Hamilton, November 21, 1997, pp. 99-100). None of the copies made by Ms. Hamilton found its way to PCS 2000 or SMG.

61 Exh. 1, pp. 33-41.

Hamilton's resignation from SMG appeared to have been prompted by her concerns about being blamed for the bidding error or being implicated in an untruth. The overall impression Mr. Breen got from his conversation with Ms. Milstein was that Ms. Hamilton was concerned she would be unfairly blamed for the bidding error.

Mr. Breen did not have any communication or contact with Ms. Hamilton on either January 24 or 25, 1996, the two days following the date on which the bidding error occurred.<sup>62</sup>

On January 25, 1996, Mr. Sullivan circulated an initial draft of a proposed waiver request, and draft supporting declarations, to be submitted to the FCC on behalf of PCS 2000.<sup>63</sup> Mr. Breen was one of the four persons to whom that draft was circulated. Later that day, Mr. Breen was one of the four persons to whom Mr. Sullivan circulated a revised draft waiver request.<sup>64</sup> Those drafts evolved into the "Request for Expedited Waiver or Reduction of Withdrawal Penalty" ("Waiver Request") PCS 2000 filed with the Commission on Friday, January 26, 1996.<sup>65</sup> With regard to Mr. Breen's participation in the Waiver Request preparation process, Mr. Sullivan recalls that

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62 Subsequent to her departure from SMG at the end of the business day on January 23, 1996, Ms. Hamilton continued to have communications with some SMG employees and consultants. However, she did not have any communication or contact with Mr. Breen between the time the bidding error was discovered on Tuesday, January 23, 1996, and the time of an unscheduled meeting with Mr. Breen on Friday, January 26, 1996.

63 Exh. 18.

64 Exh. 19.

65 Exh. 20.

"Quentin didn't have much substantive input, other than to say that we should make clear that we are not blaming the FCC at this point."<sup>66</sup>

From first draft through submission to the FCC, the Waiver Request included several critical statements. The Waiver Request's opening sentence admitted that PCS 2000 "erroneously submitted a bid...for a price ten times as high as it intended."<sup>67</sup> The second paragraph on Page 2 of the Waiver Request further acknowledged that the bidding error was the fault of PCS 2000, even if "the precise cause of the erroneous bid remains unknown."<sup>68</sup> The next paragraph of the Waiver Request specifically renounced any attempt to blame the Commission for the bidding error. And the final sentence of that paragraph neatly summed up PCS 2000's position as to where blame for the bidding error did and did not lie:

PCS 2000 has now concluded, as discussed above, that the error occurred in its own bid preparation and submission process; PCS 2000 does not attribute this error to the Commission.

If any PCS 2000 representative had previously attempted to assign blame to the Commission rather than accept it for PCS 2000, these statements constituted a clear repudiation and correction of such attempt.

The Waiver Request also echoed the statements on the cover

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66 Exh. 2, p.43.

67 Exh. 20, p. 1.

68 Exh. 2, p. 2.

sheet of Mr. Sullivan's January 23, 1996 fax to Ms. McNeil when it stated that "[Mr. Easton] supplied Mr. Segalos with copies of spreadsheet printouts indicating the bids PCS 2000 believed it had submitted."<sup>69</sup> The intent of this statement was to convey PCS 2000's belief regarding what bid it had submitted while admitting that PCS 2000 could not verify that bid.<sup>70</sup> And it was made in light of Mr. Sullivan's belief that (i) he had informed the FCC that the spreadsheets he and Mr. Easton had sent to FCC representatives on January 23, 1996 "reflected some changes made to conform to the on line bidding;" and (ii) the FCC staff acknowledged it knew of such changes when they had indicated to him "something to the effect of, 'Yes, we know that there have been changes,' or something like that."<sup>71</sup>

The receipt stamp from the Office of the Secretary of the Commission evidences that PCS 2000's Waiver Request was filed with the FCC before the Commission's 5:30 pm (EST) -- 2:30 pm (PST) -- close of business on Friday, January 26, 1996.<sup>72</sup> On Friday, January 26, 1996, there was no communication or contact between Mr. Breen and Ms. Hamilton until after 4:00 pm (PST).

Although Ms. Hamilton's faxed resignation indicated she would send someone to pick up her pay check and personal

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69 Exh. 20, p. 3, second paragraph.

70 Exh. 2, pp. 50-53.

71 Exh. 2, pp. 102-03.

72 Exh. 20.

belongings,<sup>73</sup> Ms. Hamilton, herself, went to the SMG offices on Friday, January 26, 1996 for those purposes. In going to the SMG offices on that day, she had not planned or intended to meet with Mr. Breen.<sup>74</sup> For his part, Mr. Breen had no advance knowledge that Ms. Hamilton was going to be in the SMG offices on Friday, January 26, 1996.

Ms. Hamilton arrived at SMG's offices sometime after 4:00 pm (PST), which, as demonstrated above, was a time after the Waiver Request had been filed with the Commission. Ms. Hamilton was accompanied by a friend, Rosalind Makris. When Ms. Hamilton arrived at SMG's offices, Mr. Breen was participating in a meeting in the glass-walled conference room adjacent to the office's entry area.<sup>75</sup> Ms. Hamilton did not plan or ask to speak with Mr. Breen. Instead, it was Mr. Breen who left his meeting, went out into the entry area, and initiated contact with Ms. Hamilton.<sup>76</sup> Almost as soon as Mr. Breen greeted Ms. Hamilton, she asked if they could go into his private office. In response to Ms. Hamilton's request, Mr. Breen accompanied Ms. Hamilton and Ms. Makris to his office.

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<sup>73</sup> Exh. 17-C.

<sup>74</sup> Exh. 24, attached Declaration of Cynthia Hamilton; Exh. 4-A, p. 72.

<sup>75</sup> The other participants in the meeting in the glass-walled conference room included Mr. Easton and Mr. Lamoso.

<sup>76</sup> Mr. Breen approached Ms. Hamilton because he recalled what Ms. Milstein had told him regarding Ms. Hamilton's concern about being blamed for the bidding error. Exh. 24, Declaration of Quentin L. Breen at ¶ 8.

Ms. Hamilton and Mr. Breen agree that, while they were in his office, Ms. Hamilton told Mr. Breen she thought the bidding error had been Mr. Easton's fault. They also agree she told him that Mr. Easton had attempted to place the blame for the bidding error elsewhere; specifically on her or on the FCC. She also related that she had overheard Mr. Easton on the telephone telling the FCC that the bidding error had been the FCC's fault. Mr. Breen's response to Ms. Hamilton's claims that Mr. Easton had attempted to blame others was to the effect of "That's Terry being Terry."<sup>77</sup> Ms. Hamilton also told Mr. Breen that Mr. Easton had changed the computer bidding records after the Round 11 bids had been submitted to the FCC, and that he had discarded documents relating to the Round 11 bidding process. She also mentioned that Mr. Easton had been unable to find some discarded documents which had been placed in Ms. Hamilton's trash can during an early stage of the bidding process, and that the binder containing PCS 2000's bidding records had been missing from its usual place at her desk. While they agree as to much of what was related during their conversation, Ms. Hamilton and Mr. Breen

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<sup>77</sup> The meaning of the expression "That's Terry being Terry," was explained by some of the deponents. Ms. Hamilton, when testifying that Mr. Easton was not discrete, stated, "That was what's behind the expression Terry being Terry, 'cause Terry shoots his mouth off first and thinks later." Exh. 4-A, p. 71. Ms. Milstein indicated she interpreted that expression to mean that "Terry didn't like to be wrong. And certainly he would try and find another place for the fault to be rather than with himself." Exh. 5-A, p. 63. And Mr. Breen, whose utterance of the expression is at issue, indicated it meant "Terry had -- well, to use your words -- a reputation for wanting to shift the blame to someone else." Exh. 1, p. 62.

disagree on one critical point. Ms. Hamilton thinks she told Mr. Breen that Mr. Easton sent false documents to the Commission; Mr. Breen maintains he did not hear such a charge from Ms. Hamilton. But, when Ms. Makris, the only other person present for the meeting between Ms. Hamilton and Mr. Breen, was asked if Ms. Hamilton "mentioned anything about falsified documents being sent to the FCC," she replied, "I'm pretty sure she didn't."<sup>78</sup> Both Ms. Hamilton and Mr. Breen agree she gave him no indication that she knew of or had documents or other evidence regarding the bidding error.<sup>79</sup>

For his part of their conversation, Mr. Breen told Ms. Hamilton that the accuracy of the Round 11 bids had been Mr. Easton's responsibility, not hers, and that he did not believe the bidding error was her fault. He also told her he would provide favorable recommendations regarding her work on the Auction if she needed references for future employment.

Mr. Breen and Ms. Hamilton also conversed about non-business matters before Ms. Hamilton terminated the meeting, which had lasted no more than ten or fifteen minutes. Mr. Lamoso, from his place in the glass-walled conference room, observed Ms. Hamilton, whom he knew, and Ms. Makris, whom he did not know, as they were

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78 Exh. 6, p. 10. With regard to the question of whether Ms. Hamilton told Mr. Breen false documents had been sent to the Commission, Ms. Makris further indicated "I walked out of [the meeting between Ms. Hamilton and Mr. Breen] with a conscious thought that there was something she didn't tell him, and that was real clear in my mind, and I'm pretty sure that that was it."

79 Exh. 24, Breen declaration at 2-4 and Hamilton declaration at 1.



leaving SMG's offices.<sup>80</sup>

Ms. Hamilton acknowledges that, since she had not expected to see Mr. Breen on January 26, 1996, she had not thought-out what to say to him about Mr. Easton's role in the bidding error. She also acknowledges she was "circumspect" in making disclosures to Mr. Breen during their meeting. She admits she was so because she had not yet received, or been able to cash, her final SMG paycheck, and she was afraid Mr. Easton would interfere with that process if he found out she had told anyone about his actions in connection with the bidding error. Ms. Hamilton goes so far as to say that the last thing she wanted to do during her meeting with Mr. Breen was give Mr. Breen information that would cause him to return to the conference room and confront Mr. Easton.

By the end of his meeting with Ms. Hamilton, Mr. Breen had not heard anything which he perceived as inconsistent with either the Waiver Request or the facts of the bidding error situation as he then understood them. Mr. Breen had not viewed Ms. Hamilton's statements as efforts at disclosure, but rather as attempts to disclaim the blame about which Ms. Milstein had indicated Ms. Hamilton was concerned. Also, Mr. Breen understood Ms. Hamilton to be relating only information already known to him, and not giving him any new information about the bidding error. As a result, Mr. Breen perceived no need to notify the FCC, correct PCS 2000's Waiver Request, or make any other disclosures.<sup>81</sup>

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80 Exh. 7-B, pp. 19-20.

81 Exh. 24, Breen declaration at paras. 9 and 10.